

THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-CC-0158

MISSISSIPPI TRANSPORTATION COMMISSION

APPELLANT

VERSUS

REENA KAY HELMS BUCHANAN

APPELLEE

ON APPEAL FROM THE SPECIAL COURT OF EMINENT DOMAIN
OF PONTOTOC COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Reena Kay Helms Buchanan certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. John A. Gregory, trial counsel for Appellant;
2. Matthew Phillips, in-house counsel for Appellant;
3. Lawrence L. Little & Associates, P.A., counsel for Appellant;
4. Lawrence L. Little, Counsel for Appellant;
5. Tara B. Scruggs, Counsel for Appellant;
6. Reena Kay Helms Buchanan, landowner and Appellee;
7. Hershal Helms, landowner and Appellee;
8. Duncan Lott, Counsel for Appellee;
9. Langston & Lott, P.A., Counsel for Appellee;
10. James L. Roberts, Jr., Judge for Special Court of Eminent Domain.


DUNCAN LOTT

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STATEMENT OF ISSUES

Argument I

The trial court properly admitted the testimony of Defendant's appraiser, Edwin Neelly.

Argument II

The trial court properly allowed the jury to consider the landowner's opinion as to the value of the property.

Argument III

The trial court properly denied the Plaintiff, MTC(s), Motion in Limine and the Motion for Judgment Notwithstanding the Verdict and for Remittitur, or in the Alternative, for New Trial.

STATEMENT OF THE CASE

I. Course of proceedings and disposition in court below.

The Appellee agrees with the Summary submitted by the Appellant as to the course of proceedings and disposition in court below. Appellee would add a Quick Take Appraisal was submitted by Chris Rogers on or about October 11, 2005, and the Court, pursuant to said report, entered an Order Granting Plaintiff Right of Immediate Title and Possession on or about October 24, 2005. The Court accepted the appraiser's showing total compensation and damage of \$204,000.00 for the taking of the Defendant's land, and ordered the Plaintiff to deposit with the Clerk of the Court the sum of \$174,4000.00 representing eighty-five percent of the compensation and damages due the Defendants.

II. Statement of Facts

The Appellee supplements the Appellant's Statement of Facts to accurately represent the facts and basis relied upon by the competing expert appraisers, William Milton and Edwin Neelly, Jr., and the opinions of landowners, Reena Kay Buchanan and Hershal Helms.

William Milton testified as an expert appraiser on behalf of the Mississippi Transportation Commission (hereinafter MTC). Milton is an appraiser from Summit, Mississippi whose home offices are in Houston, Texas. (Tr. 111) Milton has done approximately 60 appraisals in Pontotoc County, all on the subject Highway 6 Project (Tr. 113). Milton testified he considered size, location and topography in valuing the subject property (Tr. 122) and gave the jury an explanation of the before and after rule (Tr.123-124). Milton defined and explained the highest and best use rule. Milton focused on a 17.17 acre tract at \$3,000.00 per acre, a 24.42 acre tract at \$4,341.00 per acre, and a 34.27 acre tract at \$2,190.00 per acre (Tr. 127). Milton discussed the absorption rate when sub-dividing property for residential lots (Tr.

132). Milton valued 18 acres of the subject property at \$4,500.00 per acre for residential purposes, and \$2,000.00 per acre on the remaining 102 acres. Milton testified the remaining property after the taking would remain the same and not be affected therefore, he assessed no loss to the remainder. Milton's before value was \$290,550.00 and his after value was \$205,300.00 for a damage of \$85,250.00 (Tr. 134-135)

The jury viewed the subject property before the second day of trial and the Appellee's cross-examined Milton.

Cross-examination of Milton reflected he had done no prior appraisal work in Pontotoc County, Mississippi in the last 10 years. Milton previously worked for the Highway Department for 25 years and the company he worked for did all of the appraisal work in Pontotoc County on the Highway 6 Project. (Tr. 148) Milton testified the highest and best use of the subject property before taking was interim agricultural, which he defined as agricultural land that in the future could be developed. (Tr. 145-149) Milton was shown an aerial photograph reflecting subdivisions in the area of the subject property which he stated did not affect his opinion that the subject property was not ripe as residential property. (Tr. 151) It was pointed out that three of Milton's five comparables were on Highway 9 and one was on Highway 15, a considerable distance from the area of taking, which was located on the Pontotoc/Lee County line. (Tr. 152) Milton had eleven other comparables he looked at, but eliminated them as comparables on the subject property. (Tr. 161) Milton eliminated comparables of a half acre sale for \$5,000.00 on King's Highway and 1.38 acres for \$12,000.00 on Jagers Road, which are near the subject property. (Tr. 161) Milton testified the property north of Anderson Road had the same value as the property south of Anderson Road before the taking. (Tr. 164) Milton acknowledged Pontotoc was growing faster than any county in Northeast Mississippi and that Pontotoc had a

level 5 school system. (Tr. 165-167) Milton testified a ditch that ran through the subject property in a north to south direction had no effect on the value of the property after the taking. (Tr. 170) Milton stated, besides 18 acres, he valued all of the remaining property at \$2,000.00 per acre, whether it was on the south side or the north side of Anderson Road. (Tr. 175)

Edwin Neelly, Jr. (Neelly) testified as an expert on behalf of landowners, Hershel Helms (Helms) and daughter, Reena Kay Buchanan (Buchanan). Neelly testified he lived in Tupelo, Mississippi and had done appraisal work for over 18 years. (Tr. 185). Neelly does primary residential and farm land appraisals, and had done a lot of work in Pontotoc County. (Tr. 186) To assess the value of property, Neelly considered topography, utility, appeal, location and highest and best use. (Tr. 187) Neelly used thirteen comparables in accessing the value of the subject property and focused on similar sales in the area of taking. Neelly testified the subject property should be classified as residential and agricultural. (Tr. 188) Neelly obtained his comparables from local realtors and appraisal services (Tr. 190) and accessed the subject property at \$6,000.00 per acre for a total value of \$728,730.00. (Tr. 191) Neelly testified he did not value the property on the south side of Anderson Road as valuable as the property on the north side, as there was not as much road frontage on the south side to Anderson and Jagers Roads. Neelly accessed residential value of the subject property at \$11,000.00 to \$12,000.00 an acre and agricultural value of the subject at \$2,250.00. (Tr. 192) In accessing the after value of the subject property, Neelly considered loss of utility and loss of appeal, limited access to the property which, in his opinion, was greatly affected by the creek that ran north and south. (Tr. 193) Neelly believed the taking depreciated the value of the remaining property because the Highway 6 four-lane cut through the middle of the subject property thus lessening its appeal. (Tr. 194) Neelly accessed his after value of the subject property at \$411,055.00, for a total loss

of \$317,675.00. (Tr. 195) Neelly explained the importance of considering small acreage values, rather than only considering large acre values (Tr. 196) and he further pointed out the proximity of the subject property to other subdivisions in the area that came off a main road, such as Anderson Road, and required no road building for subdivision purposes. (Tr. 197-198) Neelly discussed the importance of the subject property being near Lee County developments of High Forest, Timberland Estates, and Country Oak Estates, all within 1.5 to 2 miles. On cross-examination, Neelly went over the layout of the subject property and testified he did not average the property, but looked at all of the comparables and came up with a reasonable value for the property as a whole. Neelly testified one could not make comparables based only on the size of the property, but must make adjustments for other factors. (Tr. 221-223) Neelly explained how he arrived at his \$6,000.00 value per acre as follows:

What I was trying to convey, and I don't know if I've done a very good job conveying it, was the difference in the value. I am not saying that the whole property is worth the same thing. I mean, you've got to look at different portions and you've got to say on the southern side of the road, in my opinion, it did not have the same utility and appeal as it did on the north side of the road. And when you had almost a perfect rectangle where you had access from Jagers Road all the way down Anderson Road, and you no longer have access on Anderson Road, and you have very limited access on Jagers Road. Actually only two acres. And of that two acres, unless there was a service road or some type of road that was built through there to access the remainder of the acreage, that acreage is worth, really, is not worth a lot. I mean, it's worth agricultural. (Tr. 228)

Neelly stated the value of the property on the south side was not as valuable as the north side of Anderson Road, and he considered this in arriving at his overall value of \$6,000.00 per acre, rather than relying on the residential comps of \$11-12,000.00 per acre. (Tr. 230) Neelly addressed the esthetic appeal of the subject property after the four-lane cut is made through the middle of the property. Neelly again, stated the property had a value

range of \$2,500.00 agricultural, to \$12,000.00 residential per acre, and he adopted a value of \$6,000.00 per acre as the most representative of the value of the whole property. (Tr. 233) Neelly reiterated he considered 13 comparables, but referred to 3 comparables in the area of the taking for the basis of this Court testimony. (Tr. 257)

Hershal Helms testified he owned the subject property for over fifty years and in fact, dug the ditches that ran through the property in a north to south direction with a drag line in 1970 and 1978 to drain the property to make it suitable for home sites. (Tr. 269) Helms in fact built Anderson Road in 1978. (Tr. 270) Helms testified his property was worth \$10,000.00 per acre and he based this on what people had offered him in the past, as well as his knowledge of sales on Jaggers Road of \$14,500.00 for 1.4 acres and \$16,500.00 for another lot on Jaggers Road. (Tr. 271-273) Helms based his opinion also on conversations with landowners who lived in the Timberlake and Hallman Lane Subdivisions, concerning their lot values. Reena Kay Buchanan, daughter of Hershal Helms, lives in Pontotoc County and lived on the subject property until she was 18 years of age. (Tr. 285) Buchanan testified she has, an uncle, niece and brother who live in the area and she gave her opinion the property had a value of \$10,000.00 based on an offer from a friend who wanted to buy 2 acres prior to 2005. (Tr. 287)

SUMMARY OF ARGUMENT

The trial court properly admitted the testimony of expert appraiser, Ed Neelly. Neelly was properly qualified as an expert in the field of appraisals. Neelly properly applied acceptable standards and his appraisal was based upon the fair market value of similar or comparable properties in close proximity to the property taken by MTC. Neelly testified sales of comparable property in the area range from \$2,250.00 an acre, agricultural to \$12,000.00 an acre residential. Neelly testified the subject property was valued at \$6,000.00 per acre when viewed as a whole, being suited for both agricultural and residential use. Due to the taking of the 18.907 acres, the remaining property held by the Defendants would be diminished in value due to limited access. MTC's argument on the testimony of Neelly's appraisal is one of weight/credibility rather than admissibility. Neelly was thoroughly cross-examined by the MTC attorney, and the jury examined the subject property and determined which expert opinion was most realistic. The jury chose the opinion of expert Neelly. The testimony of Neelly was both relevant and based upon an established appraisal method. The comparable properties he used were similarly situated to the property at issue; his estimates were not based upon mere speculation and he was subject to cross-examination to test the true utility of the comparable sales. The testimony of Neelly was reliable.

The trial court properly allowed both Buchanan and Helms to tell the jury what they believe their property to be worth. Both Helms and Buchanan testified their opinions were based upon familiarity with similar property in the area, as well as offers to purchase the subject property prior to the MTC taking. Helms testified he was familiar with the value of property sold in the area for residential use, which he believed was the highest and best use of the property taken by MTC. Helms owned the property for fifty years, built the frontage road taken by MTC, and was highly qualified to access his property for residential development. It is well

settled in eminent domain practice that a landowner may give his/her opinion of the fair market value of their property. Buchanan and Helms, through their ownership, have acquired an unique view of their property and can and ought to be allowed to share their view with the jury.

The Court after properly ruling on the admissibility of expert Neelly's appraisal opinion properly denied MTC's Motion *in Limine*, Motion for Judgment Notwithstanding the Verdict and for Remittitur, or in the Alternative for New Trial. The trial court provided the parties with a fair trial and both parties submitted their expert opinions to the jury. MTC is dissatisfied with the finding of the jury and now seeks Appellant relief because the jury did not accept the opinion of the MTC expert.

ARGUMENT AND AUTHORITIES

I. The trial court properly admitted the testimony of Defendant's appraiser, Edwin Neelly.

MTC correctly analyzes this case as a dispute between expert witnesses.

The Appellant's expert presented an opinion the property taken resulted in damages of \$85,250.00. The Appellee's expert presented his opinion the property taken and resulting damage to the remainder warranted compensation of \$317,675.00. MTC argues such a large disparity between the opinions warrants a reversal of the jury's decision. The disparity between the expert opinions must be viewed in light of the only other expert evaluation of this property by Chris Rogers, the expert appointed by the Court for the Quicktake Procedure. Rogers valued the taking at \$204,000.00, which is roughly in the middle of MTC's appraisal value and the Neelly appraisal. (Appellee R.E. 1) MTC argues because of the disparity between the MTC appraisal and Neelly's appraisal, the only way to determine the correct valuation is to look at the methods each used and determine which method was more reliable. MTC conveniently forgets the jury did look at the methods used by Neelly and MTC appraiser, Milton, and choice Neelly.

Rule 702 of the Mississippi Rules of Evidence provides an expert witness may testify in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principals and methods; (3) the witness has applied the principals and methods reliably to the facts of the case. As is often the case in eminent domain cases, the losing party appeals the jury's finding by attacking the opinions of the opposing expert appraiser. MTC takes the same tactics in the instant appeal. MTC does not dispute that Mr. Neelly's testimony met the relevancy requirement, but argues his testimony is not reliable. Neelly's opinion properly considered the market value of the property immediately before the taking and the fair market value of the remaining tract immediately after the taking.

At trial, Neelly testified he evaluated some thirteen comparable sales and relied heavily on three sales within a mile of the subject property. MTC incorrectly argues that Neelly only used three comparable sales at arriving at his opinion of value. MTC expert appraiser, Milton, testified to three comparables of \$3,000.00 an acre, \$4,341.00 an acre and \$2,150.00 an acre. (Tr. 127) However, Milton came up with a value of \$4,500.00 an acre for eighteen (18) acres of the subject property and \$2,000 per acre for the remaining 102 acres. Milton stated the remaining property would stay the same and not be affected by the taking and thus, testified to a before value of \$290,550.00 and an after value of \$205,300.00 for a damage figure of \$85,250.00.

MTC compares Milton's before value against Neelly's where he valued the subject property at \$6,000.00 per acre based on factors of topography, utility, appeal, location and highest and best use. (Tr. 187) Neelly testified the subject property was valued as cumulative, agricultural and residential. (Tr. 191) MTC expert, Milton, testified the taking would have no effect on the remaining property, however, the jury's view of the subject property showed the absurdity of Milton's opinion, and verified the damage the four-lane highway did to the Helms/Buchanan property. Neelly backed up his residential opinions based on subdivisions in the area (Tr. 197-198) and why small acreage values were important to the taking by MTC. (Tr. 196) Neelly informed the jury of the uniqueness of the Pontotoc County property near the Lee County line and provided information on three subdivisions within 1.5 to 2 miles of the subject property. (Tr. 199)

Milton stated the remaining property after taking had a value of \$2,000.00 per acre to come up with his after value of \$205,300.00. Neelly, in essence, agrees with Milton by valuing the remaining property at \$2,250.00 an acre, (Tr. 226) MTC argues Neelly's evaluation is

improper on his before value of \$6,000.00 an acre. Neelly testified his opinion of the Helms/Buchanan property on the south side of Anderson Road was not as valuable as that of on the North side and he valued the property as a whole at \$6,000.00 per acre, rather than the residential value of \$11,000.00 to \$12,000.00 an acre. (Tr. 230) Neelly testified his value of \$6,000.00 per acre was adopted as the most represented value of the whole property, rather than pieces. (Tr. 233)

The jury viewed the subject property, and accessed the opinion of both Milton and Neelly. The jury considered that MTC's expert Milton, had no prior work in Pontotoc County in the last ten years and his valuations were all based on his recent appraisal work for MTC on the Highway 6 project (Tr. 148). The jury considered Milton had been a highway department employee for twenty-five years before going to work for the appraisal company out of Texas (Tr. 148). The jury's view of the property also allowed them to access Milton's opinion the subject property was interim agricultural, which he defined as agricultural land that, in the future, might be developed. (Tr. 149-150) This same jury also viewed aerial photographs of the subject property and observed the close proximity of subdivisions in the area to refute Milton's testimony the property was not right for residential use. (Tr. 151) The jury also considered three of Milton's five comparables were on Highway 9 and one was on Highway 15 in Pontotoc County, which does not have the same appeal as the subject property with its proximity to Tupelo and Lee County. (Tr. 152) The jury, when it viewed the subject property, could also access Milton's opinion that the land North of Anderson Road had the same value as the property south of Anderson Road. (Tr. 164) The jury also was able to access the fact that Pontotoc County was the fastest growing county in Northeast Mississippi, even faster than Lee County (Tr. 165) and Pontotoc County had a level five school system.

One of the biggest factors relied upon by Neelly in accessing the property's after value was the fact that the remaining property north of Anderson Road had a ditch running in a north/south direction with Jaggers Road on the west side of the property. (Tr. 193)

MTC's argument on Neelly is one of weight and credibility rather than one of admissibility. The Supreme Court has noted expert opinion can vary widely in condemnation cases. *State Highway Commission v. Warren*, 530 So.2d 704 (Miss. 1988) and *Smith v. Mississippi State Highway Commission*, 423 So.2d 808 (Miss. 1982). The Court's evaluation of Neelly's testimony is viewed as an abuse of discretion standard. *Adcock v. Mississippi Transportation Commission*, 981 So.2d 942, 946 (Miss. 2008). The testimony offered by Neelly is similar to the MTC testimony offered in the *Adcock* case, *supra*, where the Court determined the MTC expert testimony admissible where the appraiser's testimony was both relevant and based upon an established appraisal method, comparable properties were similarly situated to property at issue, its estimates were not based upon mere speculation, and he was subjected to cross-examination to test the true utility of the comparable sale. *Adcock v. Mississippi Transportation Commission*, 981 So.2d 942, 946, 947, 948 (Miss. 2008). Our expert battle is comparable to the *Mississippi Transportation Commission v. Highland Development, LLC.*, 836 So.2d 731 (Miss. 2003) expert battle. Every complaint made by MTC on appeal regarding Neelly's testimony was brought out at trial to the jury either through direct examination, cross-examination; or a comparison with Milton's direct and cross-examination. The jury viewed the land, heard the expert opinions, along with the extensive cross-examination and rebuttal testimony, and made an assessment. The jury is not bound by the opinions of the experts; the jury is free to access its' own damages independently of the opinions offered. See *Franklin County Timber Company* 488 So.2d 782, 787 (Miss. 1986) and *Mississippi State*

Highway Commission v. Terry 282 So.2d 465, 466 (Miss. 1974). If there is substantial evidence supporting an award, the Court will not interfere, especially when the jury has viewed the property. See *Mississippi Transportation Commission v. Bridgeforth* 709 So.2d 430, 441 (Miss. 1998) and *State Highway Commission v. Franklin County Timber Company* 488 So.2d 782, 787 (Miss. 1986).

The jury viewed the property and properly considered the opinions of MTC expert Milton and Helms' expert Neelly and chose to rely upon the credentials and expertise of Neelly rather than those of MTC expert Milton. I did not agree with the opinions and values of MTC expert Milton, but that does not make his opinion inadmissible, but goes to the weight and credibility of his opinion.

II. The trial court properly allowed the jury to consider the landowner's opinion as to the value of the property.

The right of a landowner to give his opinion of the fair market value of his property is well recognized. *Brown v. Mississippi Transportation Commission*, 749 So.2d 948, 960 (Miss. 1999). *Clark v. Mississippi Transportation Commission*, 767 So.2d 173, 177 (Miss. 2000).

MTC does not argue that Helms and Buchanan didn't have a right to give their opinion, but their opinion was not supported with familiarity with the fair market values of properties of the type in issue. *Mississippi State Highway Commission v. Franklin County Timber Company*, 488 So.2d 782, 786 (Miss. 1986). Hershal Helms has owned the property for over fifty years, and in fact, dug the drainage ditches in 1970 and 1978 that ran through the property to drain the property to make it suitable for building homes. (Tr. 269) Hershal Helms built Anderson Road in 1978. (Tr. 270) Helms stated his

property had a value of \$10,000.00 (Tr. 271) an acre. Helms testified to a 1.4 acre sale for \$14,500.00, and a similar lot on Jagers Road sold for \$16,500.00. (Tr. 273)

Helms daughter, Reena Kay Buchanan, testified she lived on the subject property until she was 18 years of age and her father, uncle, cousin and brother still live there. Buchanan stated the property had a value of \$10,000.00 an acre based on a friend offering to buy one or two acres for that price prior to 2005. (Tr. 287) The rule concerning a landowner's opinion concerning the fair market value of his property is based on the premise the landowner has acquired an unique view of the property and he can and ought be allowed to share this view with the jury. Because landowners ordinarily are not experts and trained in the field of property valuation, we do not hold them to precise modes of articulation of the way in which they arrived at the value they give. *Brown v. Mississippi Transportation Commission*, 749 So.2d 948, 960 (Miss. 1999). In the case of *Clark v. Mississippi Transportation Commission*, 767 So.2d 173, 177 (Miss. 2000), the price the owner paid for the property previously is a piece of evidence in determining its present value. As to the highest and best use and comparable sales, the Court noted the landowner, Clark, had been a resident of Shubuta for thirty-one years, and testified he was familiar with sales of industrial property in the area. "We think this sufficient basis for allowing Clark to testify to comparable sales, his opinion of highest and best use of the land and ultimately, to his opinion of the fair market value of his property." The Court noted Clark's testimony was admissible, and appellees state Clark's testimony is no different than what was proffered by Helms and Buchanan. *Mississippi State Highway Commission v. Frank Robertson*, 350 So.2d 1348 (Miss. 1977) stands for the proposition that offers or options to purchase property are not competent

evidence to establish the fair market value of the property. What we can glean from *Robertson* is the Highway Commission made no objection to the landowner's testimony at the time it was offered. In the case at bar, MTC made no objection to Buchanan or Helms testifying concerning offers to purchase the property. The jury did not accept Helms and Buchanan's \$10,000.00 per acre valuation, but rather accepted the \$6,000.00 per acre valuation assigned by expert Neelly. MTC was obviously not prejudice by testimony of Helms and Buchanan as the jury's verdict ignored their opinions.

III. The trial court properly denied the Plaintiff, MTC(s), Motion in Limine and the Motion for Judgment Notwithstanding the Verdict and for Remittitur or in the Alternative, for New Trial.

MTC's final issue is the Court's failure to grant it's Motion *in Limine* and Motion for Judgment Notwithstanding the Verdict and for Remittitur, or in the Alternative, for New Trial, which are based upon the argument that the testimony and opinion of Edwin Neelly should have been excluded. MTC adds the additional argument that, Neelly on cross-examination, attempted to rehabilitate his direct testimony by attempting to testify outside the parameters to the questions being asked. MTC's argument ignores the fact that Neelly would have been able to rehabilitate himself after MTC's cross-examination by re-direct testimony. MTC's argument concerning the admissibility of Neelly's opinion carries little weight in MTC's first assignment of error and likewise, carries little weight in MTC's third assignment of error. The parties had ample opportunity to challenge the opinions of each parties' expert appraisal.

CONCLUSION

Appellee asks this Court find the trial Court properly admitted all expert testimony in this case and allowed the jury to weigh the credibility of the witnesses and access the damage attributed to the MTC taking of Helms and Buchanan's property.

RESPECTFULLY SUBMITTED, this the 1 day of July, 2011.

REENA KAY HELMS
BUCHANAN, Appellee



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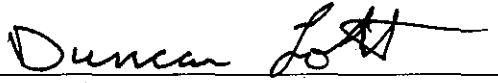
CERTIFICATE OF SERVICE

I, Duncan Lott, Attorney at Law, Booneville, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a copy of the above and foregoing Brief of Appellee to:

Judge James L. Roberts, Jr.
P. O. Drawer 1100
Tupelo, MS 38829

Tara B. Scruggs, Esquire
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THIS, the 1 day of July, 2011.


DUNCAN LOTT